

No. 22-15705

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEJANDRO TOLEDO MANRIQUE,

Petitioner-Appellant,

v.

MARK KOLC,

United States Marshal for the Northern District of California,

Respondent-Appellee.

**UNITED STATES'S OPPOSITION TO APPELLANT'S PETITION FOR
PANEL AND EN BANC RECONSIDERATION, AND ADDITIONAL STAY**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA NO. 3:21-CV-08395 LB

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**UNITED STATES’S OPPOSITION TO APPELLANT’S PETITION FOR
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Following its original, October 19, 2022, denial of Petitioner-Appellant Alejandro Toledo Manrique’s (“Toledo”) motion for a stay of his extradition to Peru, this Court denied Toledo’s renewed motion on April 5, 2023, in a published order (“the Order”). *Toledo v. Kolc*, -- F.4th --, 2023 WL 2780352 (9th Cir. Apr. 5, 2023); Dkts. 22, 49. The panel correctly held that Peru satisfied the terms of its treaty with the United States in seeking Toledo’s extradition. And the Order neither conflicts with a decision of the Supreme Court or any circuit, nor otherwise involves a question of exceptional importance as to merit en banc review under Fed. R. App. P. 35.

Accordingly, this Court should deny Toledo's petition for reconsideration as well as his unsanctioned motion for a longer stay, Dkt. 55-1 ("Motion"), and should allow the government, without further delay, to comply with its treaty obligations.

BACKGROUND

This case arises out of Peru's request for the extradition of Toledo, a former president of Peru, so that he may be prosecuted for collusion and money laundering. These charges relate to bribes that Toledo allegedly solicited and received from Constructora Norberto Odebrecht S.A., a Brazilian construction company in Peru, in exchange for facilitating Odebrecht's winning contracts to build sections of a highway spanning between Peru and Brazil.

A. Peru's charging of Toledo and request for his extradition from the United States

Peru's Code of Criminal Procedure describes the stages of a criminal prosecution in Peru. At the initial step, *La Investigación Preparatoria* or Preparatory Investigation, the Peruvian Office of the Public Prosecutor ("the Prosecutor") gathers evidence and decides whether to dismiss or formulate charges. *See* Motion at p. 3 n.5; Código Procesal Penal at <https://cdn.www.gob.pe/uploads/document/file/3574396/CODIGO%20PROCESAL%20PENAL%20%20S%C3%A9ptima%20Edici%C3%B3n%20Oficial.pdf> (Arts. 321–25, 344–48).

The Prosecutor proceeds to the intermediate stage by filing a *Decisión del Ministerio Público* or Prosecutor’s Decision with the court. *Id.* The Prosecutor proceeds by filing a second charging document is the *Acusación Fiscal* that includes the articles of criminal law with which the defendant is charged and proof of the elements. *Id.* at Art. 349. The filing of an *Acusación Fiscal* allows the defendant to make certain challenges, including seeking dismissal of charges and offering evidence for trial, and triggers the Judge of the Preparatory Investigation to set a preliminary hearing, which is an adversarial proceeding. *Id.* at Art. 350.

After resolving such issues, the Judge initiates the final stage by issuing *El Auto de Enjuiciamiento* or *Orden de Enjuiciamiento*, which refers the case to a Criminal Court for trial. *Id.* at Arts. 353–54. The Criminal Court then issues a trial summons called *El Auto de Citación a Juicio*. *Id.* at Art. 355.

In March 2018, when several Prosecutor’s Decisions had been filed against Toledo, the Supreme Court of Justice of Peru approved the request for his extradition, and in May, Peru requested of the United States Toledo’s extradition. Dkt. 18 (Appellee’s Answering Brief or “AAB”) at pp. 9–10.

The Extradition Treaty between the United States of America and the Republic of Peru (“the Treaty”), U.S.-Peru, July 26, 2001, T.I.A.S. No. 03-825, S. Treaty Doc. No. 107-6, 2001 WL 1875758, at *1, obligates the parties to extradite “persons whom the authorities in the Requesting States have charged with, found

guilty of, or sentenced for, the commission of an extraditable offense.” A request for extradition of “a person who is sought for prosecution” must be supported by specified documents, including “a copy of the warrant or order of arrest issued by a judge or other competent authority,” “a copy of the charging document,” and evidence amounting to probable cause. *Id.* at *8; *see* AAB at pp. 6–8.

Following the U.S. Department of State’s review of Peru’s extradition request, in July 2019, the government brought extradition proceedings under 18 U.S.C. § 3184 against Toledo in the Northern District of California. *Id.* As the prosecution of Toledo developed, Peru supplemented its extradition request with the *Acusación Fiscal* filed against him in Peru on August 11, 2020. *Id.*

B. The extradition court’s certification of Toledo’s extradition

On September 28, 2021, the extradition court (Thomas S. Hixson, MJ., No. 19-mj-71055) certified Toledo’s extradition to the U.S. Secretary of State. AAB at p. 2. The extradition court did so after considering and rejecting Toledo’s arguments that Peru had failed to comply with the Treaty’s charging and documentary requirements, which Toledo contended required Peru’s issuance of an *Orden de Enjuiciamiento*. AAB at pp. 10–14. The extradition court also rejected Toledo’s argument that Peru failed to establish probable cause that Toledo committed collusion and money laundering. AAB at pp. 15–22.

C. The habeas court's denial of Toledo's petition

Toledo petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, renewing his argument that Peru failed to comply with the Treaty's charging and documentary requirements. AAB at p. 22. On April 22, 2022, the habeas court (Laurel Beeler, MJ., No. 21-cv-08395) denied Toledo's petition in a lengthy written order. AAB at pp. 2, 23–24. The habeas court also denied Toledo's motion to stay his extradition pending appeal, noting that Toledo had failed to demonstrate the requisite likelihood of success, but granted a temporary stay to allow Toledo to seek relief from this Court. AAB at p. 24.

D. This Court's denial of Toledo's initial request for a stay of extradition

On October 19, 2022, after the completion of principal briefing in Toledo's appeal, a motions panel of this Court (M. Smith, Bress, Van Dyke, JJ.) denied Toledo's motion for a stay pending appeal, with the understanding that extradition would moot Toledo's appeal. Dkt. 22; *see* Dkt. 4-1 at p. 7; Dkt. 5-1 at p. 15. Toledo filed his reply brief on December 16, 2022. Dkt. 34.

E. The U.S. Department of State's issuance of a warrant for Toledo's surrender, and Toledo's new litigation to stay extradition

On February 21, 2023, the U.S. Department of State issued a warrant authorizing Toledo's surrender to Peru, after fully reviewing the materials and filings in this proceeding, materials Toledo's retained counsel from the firm

WilmerHale LLP¹ had submitted, as well as “information regarding the current situation in Peru, and other relevant information.” Dkt. 41-2 at A-008.

Toledo then renewed his motion in the habeas court for a stay of his extradition. Dkt. 41-1 at p.7. That court again only granted a temporary stay to allow Toledo to seek relief from this Court. *Id.* On February 27, 2023, Toledo filed a “renewed” motion for this Court to stay his extradition pending resolution of his appeal. Dkts. 37, 41-1.

The government moved in the extradition court to revoke Toledo’s bail and remand him to custody.² No. 19-mj-71055 at Dkt. 211. That court held the request pending this Court’s disposition of Toledo’s stay motion. No. 19-mj-71055 at Dkt. 218.

On March 6, 2023, at oral argument on Toledo’s appeal, the Court asked questions regarding Toledo’s renewed stay motion. Dkt. 44. The following day, Toledo filed a declaratory judgment suit in the U.S. District Court for the District of Columbia, moving to enjoin the U.S. Department of State from acting upon its

¹ Over the government’s objection, Toledo has been represented in the extradition proceeding and this habeas proceeding by appointed counsel. No. 19-mj-71055 at Dkts. 25, 49, 88.

² The extradition court originally detained Toledo, No. 19-mj-71055 at Dkts. 16, 25, 45, 100, but on March 19, 2020, in consideration of the pandemic, ordered him released on a \$1 million bond with \$500,000 in cash bail posted. No. 19-mj-71055 at Dkts. 115, 118, 120, 188–89, 198.

final determination to extradite him. *See* Dkt. 48 at pp. 10–12. That court (Beryl A. Howell, DJ., No. 23-cv-627) denied Toledo’s motion on March 28, 2023, criticizing Toledo’s “forum shopping” as an “abuse of the judicial process.” *See* Dkt. 48 at pp. 18–19.

F. The Order

On April 5, 2023, the merits panel (Friedland, R. Nelson, JJ.; Cardone, DJ.) entered the Order at issue here, for publication, denying Toledo’s renewed motion for a stay of his extradition. Dkt. 49; *see* Circuit Rule 36-5 (published order “may be used for any purpose for which an opinion may be used”). The panel found that although Toledo had shown irreparable injury, he had not shown a likelihood of success on the merits, explaining that its “analysis is informed by the significant time that we had devoted to the merits when Toledo filed this stay motion one week before argument.” *Toledo*, 2023 WL 2780352, at *3 & n.1.

The panel found that the Treaty’s plain language (which makes no reference to either an *Orden de Enjuiciamiento* or “formal” charges) and drafting history (which specifically allows for various forms of charging documents), caselaw interpreting similar treaties, and the Court’s rules for interpreting treaties, all supported the conclusion that the *Acusación Fiscal* charged him with extraditable offenses under the Treaty and satisfied the Treaty’s requirement that a charging document be submitted in support of Peru’s extradition request. Toledo had thus

failed to show a likelihood of success on the merits of his claim that Peru had not complied with the Treaty's requirements. *Id.* at *3–*5.

The panel also found that Toledo had not shown a likelihood of success in challenging the existence of probable cause, based on the self-incriminating testimonies of two witnesses, as well Toledo's own admissions that millions of dollars of bribe money had "ended up in his mother-in-law's company," and that half-a-million had been used to "purchase real estate titled to him." *Id.* at *5–*6.

The panel also found that Toledo had failed to show that the public interest favored the stay, as the public interest would "'be served by the United States complying with a valid extradition application' because 'proper compliance promotes relations between the two countries, and enhances efforts to establish an international rule of law and order.'" *Id.* at *6 (quoting *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986)).

On the same day that this Court denied Toledo's renewed motion for a stay of extradition pending appeal, the extradition court ordered Toledo to self-surrender to the U.S. Marshal two days hence. No. 19-mj-71055, Dkt. 221. But subsequently, over the government's objection, the merits panel "partially granted" Toledo's motion for a stay, and stayed his extradition for 14 days "to allow Toledo an opportunity to move for reconsideration by the panel or the en banc court," subject to an expedited schedule. Dkts. 50-1, 51–54. The extradition court then

vacated its order of commitment, allowing Toledo to remain on bond. No. 19-mj-71055 at Dkt. 224.

ARGUMENT

I. PANEL RECONSIDERATION IS UNWARRANTED

Although Toledo's motion seeks panel reconsideration, Toledo has not stated "with particularity [what] points of law or fact" he believes "the Court [to have] overlooked or misunderstood," nor identified any change in legal or factual circumstance occurring after the Order was issued, to warrant panel reconsideration. Circuit Rule 27-10(a)(3); Circuit Advisory Comm. Note to Rule 27-10. Rather, Toledo simply disagrees with the Order's analysis and conclusion. That is not a basis for reconsideration, where motions for reconsideration are "disfavored" and "rarely granted" to begin with. Circuit Rule 27-1(4). Indeed, the Order is already the result of the merits panel's reconsideration of the motion panel's original denial of Toledo's motion for a stay of extradition. This Court should not grant Toledo a third bite at the proverbial apple. *See* Circuit Rule 27-10(b) (a party "may file only one motion for . . . reconsideration of a motions panel order").

II. EN BANC REHEARING IS UNWARRANTED

En banc review is "entirely discretionary," and "reserved for 'a question of exceptional importance' or 'to secure or maintain uniformity of the court's

decisions.’’ *United States v. Washington*, 864 F.3d 1017, 1033 (9th Cir. 2017) (Hurwitz, J., statement re: denial of r’hg en banc) (quoting Fed. R. App. 35(a)). Toledo’s case meets neither criteria.

A. Review of the Order is not necessary to secure or maintain uniformity of the Court’s decisions

The Order does not conflict with a decision of the Supreme Court or this Court. Fed. R. App. P. 35(a)(1), (b)(1)(A). The Order is a straightforward application of *Nken v. Holder*, 556 U.S. 418, 434 (2009), finding that Toledo did not merit a stay—which is “‘an exercise of judicial discretion’”—of his extradition to Peru. *Toledo*, 2023 WL 2780352, at *2–*3. Toledo does not argue that the panel misapplied *Nken*. He merely disagrees with the panel’s determination on the first *Nken* factor. Motion at pp. 8–9.

On that factor, the panel followed circuit precedent. *Toledo*, 2023 WL 2780352, at *4. *Emami v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 834 F.2d 1444, 1448 (9th Cir. 1987), held that the phrase “charged with” in the U.S.-Germany extradition treaty was used “as a verb in the generic sense only to indicate ‘accused,’ could not be transmuted into a requirement” that a specific charging document, the *Anklage*, had to have been filed, even though the German Code of Criminal Procedure defined a person charged as someone against whom the *Anklage* had been filed. *Contra* Motion at pp. 9–10 & n.10 (taking issue with Order’s preference of verb). That the U.S.-Germany treaty did not require “[a]

copy of formal charges” to accompany an extradition request was additional evidence that “charged with” did not require particular charges to have been filed. *Emami*, 834 F.2d at 1448.

Emami, 834 F.2d at 1448, in turn, found persuasive the Seventh Circuit’s analysis in *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980). *Assarsson* held that the meaning of “charged with” in Article I of the U.S.-Sweden extradition treaty was in contrast to persons convicted of an offense, and did not require the filing of a “summons” under the Swedish Code of Judicial Procedure against the subject of the extradition request. *Assarsson*, 635 F.2d at 1239 & n.3, 1242–43. The Seventh Circuit found evidence for its conclusion in Article XI’s absence of any requirement that a summons accompany the extradition request. *Id.* at 1243.

The panel’s conclusion that the Treaty here does not require the filing of an *Orden de Enjuiciamiento* is consistent with *Emami*, and for that matter, *Assarsson*. The Treaty has the same “charged with” language analyzed in both decisions. And although the Treaty here does require a copy of “the charging document” to be submitted with the request for extradition, it nowhere specifies that the charging document be an *Orden* or even of “formal” charges.

Toledo suggests that the panel misread *Emami* and *Assarsson*. Motion at pp. 11–12. But this is manifestly untrue. Those cases found that the absence of a treaty provision requiring a specific charging document (*i.e.*, a German *Anklage* or

a Swedish summons) was evidence that those treaties did not limit extradition to individuals who had been charged by those specific documents. Likewise, the panel here found that the fact that the Treaty does not require an *Orden de Enjuiciamiento* as proof of charging, is evidence that the Treaty allows for Toledo's extradition based on his being charged by an *Acusación Fiscal*.

Of course, in finding Toledo unlikely to succeed on the merits of his argument, the panel did not rely exclusively on *Emami*. Foremost, the panel looked to the plain language of the Treaty, which nowhere specifies an *Orden de Enjuiciamiento* or any particular document. *Toledo*, 2023 WL 2780352, at *4. The panel also relied on the rules for interpreting treaties, which prescribe liberal construction to enlarge the rights of the parties. *Id.* at *5.

The panel also explained that “[e]ven if” the term “charged with” were ambiguous, the “drafting history” provides “strong evidence” that the Treaty does not limit extradition to persons against whom a Judge has issued an *Orden de Enjuiciamiento*. *Id.* The Technical Analysis for the Treaty explicitly contemplated the extradition of individuals subject to arrest “pursuant to an indictment, complaint, information, affidavit, or other lawful means for initiating an arrest for prosecution under the laws in Peru or the United States.” *Id.* (quoting S. Exec. Rep. No. 107-12, at 4 (2002), <https://www.congress.gov/107/crpt/erpt12/CRPT-107erpt12.pdf>). Toledo's speculation as to what the Treaty drafters must have

intended, Motion at p. 13,³ fails to overcome the deference this Court generally affords to such analyses when interpreting treaties. *In re Premises Located at 840 140th Ave. NE*, 634 F.3d 557, 569 (9th Cir. 2011).

Moreover, both parties to the Treaty are united in the view that the 1,269-page *Acusación Fiscal* against Toledo, filed with the Judge of the First National Court for Preliminary Investigation Proceedings with Jurisdiction over Organized Crime, satisfies the Treaty’s charging and charging-document requirements. AAB at pp. 9–14, 23, 42–45. The Supreme Court in *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982), requires deference to these views, where consistent with the Treaty language and not contrary to extraordinarily strong evidence. *Toledo*, 2023 WL 2780352, at *5.

The Order is well-considered and consistent with Supreme Court and circuit precedent.

B. The Order does not involve a question of exceptional importance

Nor does the Order involve a question of exceptional importance.

The Order does not conflict with any published decision of another court of appeal. Fed. R. App. P. 35(a)(2), (b)(1)(B). Contrary to Toledo’s claim, Motion at pp. 11–13, the merits panel and the First Circuit did not reach “opposite

³ Toledo’s citation to *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010), is inapposite, as that case discusses what courts “normally assume . . . when Congress enacts statutes,” not when two countries negotiate an international treaty.

conclusions.”⁴ See AAB-38–39. *Aguasvivas v. Pompeo*, 984 F.3d 1047 (1st Cir. 2021), merely held that an arrest warrant did not alone satisfy both documentary requirements of the U.S.-Dominican Republic extradition treaty of a warrant and of a document setting forth charges. *Aguasvivas*, 984 F.3d at 1057–60. The panel here reached an entirely distinct issue. Peru submitted both a warrant and a separate charging document, namely the *Acusación Fiscal*. The panel held that the *Acusación Fiscal* satisfied the requirements of the Treaty, which did not require the issuance of an *Orden de Enjuiciamiento*.

Not only is the tension between the Order and *Aguasvivas* illusory, but *Aguasvivas* plainly contradicts Toledo’s argument that the Treaty’s charging-document requirement means that the United States must submit an Indictment with an extradition request, just as he argues Peru must submit an *Orden de Enjuiciamiento*. Motion at p. 12. *Aguasvivas* stated: “Most persons familiar with criminal procedure would read” ““the document setting forth charges”” “as referring to either an indictment, a criminal complaint, or in some circumstances in this country, an information.” 984 F.3d at 1058.

Where there is no circuit split, a question may still be of exceptional importance if, for example, it “may well affect large numbers of parties with

⁴ Toledo does not argue that the Order presents a “direct conflict” with any circuit decision other than *Aguasvivas*. Motion at p. 11.

critical contractual and statutory rights.” *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 996–97 (9th Cir. 2003); *cf. United States v. Cooley*, 947 F.3d 1215, 1216 (9th Cir. 2020) (Berzon, Hurwitz, JJ., concurring in denial of rehearing en banc) (no question of exceptional importance where case involved “an unusual factual scenario” and “the practical implications are limited”). Toledo does not invoke this rationale for en banc review, and for good reason. The Order here presents no issue of broad and deep consequence.

The panel interpreted—in the context of deciding a stay motion—language from one extradition treaty, as applied to the charging practice of one foreign counterpart. The limited application of this decision is evidenced by the fact that, despite the Treaty being in effect for over two decades, Toledo cites no other circuit decision addressing his claim or reaching a different construction. Nor has Toledo demonstrated any wider ramifications from the Order other than a cursory statement about it possibly influencing the construction of “similar language in other treaties.” Motion at pp. 2–3. Of course, the United States does have extradition treaties with other nations, but Toledo does not maintain that many of these contain the same charging-document requirements as well as a negotiating and drafting history that explicitly contemplated the satisfaction of a charging-document requirement by multiple charging documents. And while courts have a role in extradition, this role is fairly limited. *United States v. Knotek*, 925 F.3d

1118, 1124 (9th Cir. 2019); *Vo v. Benov*, 447 F.3d 1235, 1237 (9th Cir. 2006).

At base, the question presented here is the type of case-specific dispute that the panel was well-equipped to resolve. It does not merit en banc reconsideration.

III. FURTHER STAY IS UNWARRANTED

This Court should also deny Toledo's request for a further stay. Dkt. 55-1. Toledo sought "a 14-day stay to allow him to move for reconsideration" of the Order. Dkt. 50-1 at p. 9. This Court granted him a 14-day stay of extradition, until April 20, 2023, for this purpose. Dkt. 53. Toledo has now moved not only for reconsideration, but for a further 21-day stay. Dkt. 55-1. As discussed, Toledo has failed to establish that he meets this Court's criteria for panel or en banc reconsideration. This Court may confidently decide Toledo's motion within the schedule it set, and should deny Toledo's latest effort to delay his extradition.

CONCLUSION

For the foregoing reasons, this Court should deny Toledo's petition for reconsideration and request for a further stay of extradition.

Dated: April 17, 2023

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CERTIFICATE OF COMPLIANCE

**Fed. R. App. P. 27(d)(1)(E) & (2), Circuit Rule 27-1(1)(d), and
Circuit Rule 32(a)(5) & (6)**

I certify that the Government's Opposition to Petitioner's Motion complies with Ninth Circuit Rule 27(d)(1)(E) & (2) and Circuit Rule 32(a)(5) & (6):

It is proportionately spaced, has a typeface of 14 points in Times New Roman, and does not exceed 20 pages. The total word count is 3,568.

s/ Merry Jean Chan
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